

**IN THE MATTER OF THE ARBITRATION**

**FLORIDA DEPARTMENT OF  
EDUCATION, DIVISION OF BLIND  
SERVICES,  
PETITIONER**

v.

**UNITED STATES DEPARTMENT OF  
THE AIR FORCE, AIR  
FORCE BASE,  
RESPONDENT**

**Case No. R-S/15-13**

**Appearances:**

**For the Petitioner:**

**BRENT MCNEAL, Esq.  
Deputy General Counsel**

**For the Respondent:**

**KEVIN G. NORMILE, Esq  
JOSEPH LOWMAN, Esq  
WILLIAM PAULSON, Esq  
Eglin Law Center**

**DECISION AND AWARD**

Pursuant to the rules and regulations of the Randolph-Sheppard Act and the Collective Bargaining Agreement between the Florida Department of Education, Division of Blind Services (the SLA) and the Department or the Air Force, Eglin Air Force Base (EAFB), the undersigned were selected as impartial Arbitrators to hear and decide on the issues described herein.

Dr. John McCollister of Las Vegas, Nevada, was selected by the parties as the Neutral Chair of the three-member Arbitration Panel. Other Panel members were Mr. Seven Fuscher of Englewood, Colorado, and Mr. Terry Smith of Chattanooga, Tennessee.

A hearing was held on November 15, 2016, at Eglin AFB in Florida.

The parties were given full opportunity to present testimony and evidence. At the dose of the hearing. both parties elected to file briefs in lieu of oral arguments. The panel has considered the testimony, exhibits, briefs and arguments in reaching its decision.

### **THE ISSUES**

The Panel was requested to address two issues:

1 – Did Eglin AFB afford the Florida Department of Education. Division of Blind Services (the SLA) their priority as provided for in the Randolph-Sheppard Act and its implementing regulations? If not, what is the appropriate remedy? In response to this issue, the panel will address the supplemental issue of whether or not the Department of the Air Force at Eglin AFB (EAFB) violated the Randolph-Sheppard Act by failing to establish a competitive range in it source selection for dining hall services at Eglin AFB, Florida.

2 – Did EAFB violate the Randolph-Sheppard Act and its implementing regulations when it neither approved nor disapproved the permit the vending machines.

The first issue relates to the interaction of the RSA with the Federal Acquisition Regulations (FAR) and its agency supplements. The Florida Department of Education's letter dated April 24, 2015 requests an arbitration to determine whether the Department of Defense at Eglin AFB is “acting out of compliance with the provisions of the Randolph Sheppard Act, specifically by failing to consult with the Secretary of the United States Department of Education (Secretary) so that the Secretary could make a determination regarding the solicitation as required by 34 C.F.R. §395.33(a).” This issue relates to the interaction of the RSA and FAR as supplemented by the Department of Defense (DoD).

The Second issue asks the panel to determine whether or not the Air Force at Eglin AFB has acted in good faith to negotiate a permit for the SLA to operate vending machines on Eglin AFB. If so, did the Air Force fail to advise the SLA, in writing, of the reasons for the denial of the permit? If so, was the Air Force required to notify the SLA,

in writing of the reasons for the denial under 34 C.F.R. § 395.16? The Panel will address solicitation for the award of dining hall services first.

### **FINDINGS AND SPECIFIC STIPULATIONS OF FACT**

The Parties did stipulate to a set of undisputed facts and the panel has set forth the following “Finding of Facts” that include relevant stipulations of facts agreed to by the parties:

1. Congress passed the Randolph-Sheppard Act in 1936 to provide blind persons with increased employment opportunities through the operation of vending facilities on federal property.<sup>1</sup> Military dining facilities are considered vending facilities under the RSA. The RSA was substantially amended in 1974 and implementing regulations were enacted in 1977 at 34 C.F.R. 395.1 *et seq.* The United States Department of Education administers the RSA, and the Secretary of Education designates “state licensing agencies” (SLAs) to license blind persons to operate vending facilities.

2. The SLAs negotiate with the federal government for a permit to operate vending facilities on federal property. Vending facilities are stand-alone operations where no appropriated funds are awarded to the SLA to operate these facilities. Appropriated funds are awarded to the SLA for service to operate a dining hall facility. The award of a contract for dining hall services is governed by federal procurement laws and regulations as well as specific statutory authorizations provided by the RSA.

3. The Florida Department of Education, Division of Blind Services, is Florida’s state licensing agency, or SLA, for purposes of the Act.<sup>2</sup>

4. On February 17, 2015, Solicitation No. FA2823-15-R-3004 (“Solicitation”) was posted to the Federal Business Opportunities (FBO) website, [www.fbo.gov](http://www.fbo.gov).<sup>3</sup> The solicitation required the contractor provide all personnel, supervision, and

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<sup>1</sup> 20 U.S.C. §107 *et seq.*

<sup>2</sup> Tr 42:16-24.

<sup>3</sup> *Joint Stipulation (J. Stip.)* at 1.

any item and services necessary to perform Full Food Services (FFS) for the Lightning Dining Facility at Eglin Air Force Base, Florida.<sup>4</sup>

5. The Solicitation acknowledged the applicability of the RSA and provided that award would be made to the SLA in accordance with the RSA, provided that the SLA's proposal was technically acceptable, its past performance was determined to be acceptable, and its Total Evaluated Price was complete, reasonable, and balanced.<sup>5</sup> The Solicitation informed all offerors that the competition was a competitive Lowest Price Technically Acceptable ("LPTA") source selection in which competing offeror's technical proposal, past performance history, and cost or price considerations would be considered.<sup>6</sup> The Solicitation stated that the acquisition was "being conducted using Simplified Acquisition Procedures under the authority of FAR 13.5."<sup>7</sup>

6. The Solicitation stated that award would be made to the responsible offeror who submitted a proposal that (1) conformed to the requirements of the solicitation; (2) received a rating of "Acceptable" on both the Technical and Past Performance evaluation factors; and (3) had the lowest Total Evaluated Price ("TEP"), provided that the TEP was not unbalanced and was reasonable.<sup>8</sup> However, award would go to the State Licensing Agency ("SLA") in accordance with the Randolph-Sheppard Act, provided that the SLA's proposal was technical acceptable, their past performance was determined to be acceptable, and their TEP was complete, reasonable, and balanced.<sup>9</sup> The Solicitation also clearly informed the offerors that the Air Force intended to award the contract without discussions with respective offerors.<sup>10</sup>

7. The Solicitation provided: *If, during the evaluation period, it is determined to be in the best interest of the Government to hold discussions, offeror*

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Respondent's Exhibit E, Solicitation*, at 58.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

responses to Evaluation Notices (ENs) and the Final Proposal Revision (FPR) will be considered in make the selection decision.”<sup>11</sup>

8. In accordance with the Solicitation, all offers were due by March 19, 2015.<sup>12</sup> On March 19, 2015, seven offers were received.<sup>13</sup> The SLA submitted an offer.<sup>14</sup>

9. The contracting officer determine that the SLA’s proposal was technically acceptable and its past performance was acceptable.<sup>15</sup> Without setting a competitive range, the contracting officer determined that the SLA’s total evaluated price was not reasonable.<sup>16</sup>

10. In accordance with the evaluation procedures in the solicitation, all offers were ranked in order of price.<sup>17</sup> Acorn provided the lower total price (\$4,476,109) while the SLA proposed the fifth highest price (\$5,609,998.12).<sup>18</sup> Acorn was then evaluated for technical and past performance acceptability. The contracting officer determined that Acord was technically acceptable and their past performance was also acceptable.<sup>19</sup>

11. The contracting officer then evaluated the SLA’s proposal. The contracting officer determined that the SLA’s proposal was technically acceptable and had acceptable past performance.<sup>20</sup> However, the contracting officer determined that the SLA’s total evaluated rice was not reasonable.<sup>21</sup> The SLA’s proposed total price of \$5,609,998.12 was 25.33% (\$1,133,889.12) higher than the awardee Acord, and 14% higher than the Independent Government Estimate (“IGE”).<sup>22</sup> The contracting officer determined that the SLA’s proposal did not have a reasonable chance for final award

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<sup>11</sup> *Id.*; Florida Department of Education, Division of Blind Services (DBS) at 58 (emphasis added).

<sup>12</sup> J. Stip. at 1.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*; Respondent’s Exhibit S, Best Value Decision Document.

<sup>15</sup> *Id.* at 2.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

because their proposed price was unreasonable.<sup>23</sup> The contracting officer determined that while the SLA could provide food of a high quality, it could not do so at a reasonable cost. In accordance with the terms and evaluation criteria contained in the Solicitation, the contract was awarded to Acorn on April 8, 2015.<sup>24</sup>

12. Acorn Food Services, Inc. (Acorn) provided the lowest total price, while the SLA proposed the fifth highest price.<sup>25</sup> The contracting officer determined that Acorn's bid was technically acceptable and that its past performance was also acceptable.<sup>26</sup>

13. Contract No. FA2823-15-C-3007 ("Contract") was awarded to Acorn on April 8, 2015.<sup>27</sup>

14. On April 20, 2015, the SLA submitted an Agency Level Protest ("Protest") regarding the award for the Contract to Acorn.<sup>28</sup> In its protest, the SLA argued that Air Force was required to consult with the Secretary of the United States Department of Education ("Secretary") to determine whether the SLA's priority must be afforded with respect to the Contract; that the contracting officer was required to establish a competitive range under the Act; that the SLA's bid was reasonable; and that Acorn's bid was unreasonable.<sup>29</sup>

15. On May 21, 2015, the Air Force issued an Agency Protest Decision ("Decision") denying the Protest in its entirety.<sup>30</sup> In the decision, the Air Force stated that the Solicitation "made clear" that the Air Force "never intended to establish a competitive range." The Solicitation does not include a specific reference to the term "competitive range."<sup>31</sup>

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<sup>23</sup> Tr. Testimony of Mr. Wilson, at 158-159.

<sup>24</sup> Resp. Ex. D. *J. Stip*; Resp. Ex. S, *Best Value Decision Document*.

<sup>25</sup> *Id.*

<sup>26</sup> *J. Stip.* at 2.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *DBS 4* at 4-6.

<sup>30</sup> *J. Stip.* at 3.

<sup>31</sup> *J. Stip.* at 1.

16. On April 24, 2015, the SLA submitted a request to the U.S. Department of Education to convene an Ad Hoc Arbitration Panel pursuant to the Act.<sup>32</sup>

17. On or about September 28, 2015, the SLA received a letter from Janet LaBreck, Commissioner of the Rehabilitation Services Administration of the U.S. Department of Education, authorizing the convening of an arbitration panel to hear and render a decision on the issues raised in the SLA's letter requesting arbitration.<sup>33</sup>

### *Facts Relating to Vending Machine Issue*

18. William Findley is the Bureau Chief of the Division's Business Enterprise program.<sup>34</sup> The Business Enterprise program implements the Act in Florida.<sup>35</sup>

19. On October 15, 2014, Mr. Findley received an email from Roger Wong, Resource Manager at Eglin AFB.<sup>36</sup> Mr. Wong's email asked for information regarding blind vending permits at Eglin AFB.<sup>37</sup> The email included two attachments.<sup>38</sup> One attachment was titled, "FY14 Interagency Report Annual Interagency Report on State Licensing Agency (SLA) Applications Received for Establishment of Vending Facilities on Federal Property and Amount of Vending Machine Income Collected and Disbursed to SLA."<sup>39</sup> The document includes columns for the amount of vending machine income disbursed to the SLA by Eglin AFB and the amount pending disbursement to the SLA by Eglin AFB.<sup>40</sup> The other attachment was an Air Force document with the subject, "Vending Facility Program for the Blind on Air Force Property Report."<sup>41</sup> It provides, in relevant part, that the reported information "should include non-Services organizations (does not include AAFES)," and that the installation must report the "total amount of vending machine income collected by the Federal Property Management Agency (FMPA

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<sup>32</sup> *J. Stip.* at 3.

<sup>33</sup> *Id.*

<sup>34</sup> Tr. 42:16-22.

<sup>35</sup> Tr. 43:4-25; T44:1-11.

<sup>36</sup> DBS 9 at 1

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*; DBS 13 at 1.

<sup>40</sup> DBS 13 at 2.

<sup>41</sup> DBS 9 at 1; DBS 14 at 1.

– installation)” and “the total amount of vending machine income disbursed to the SLA....”<sup>42</sup>

20. The Division currently does not receive any income from vending machines at Eglin AFB.<sup>43</sup> The Division informed Mr. Wong that there was nothing to report to him, because the SLA does not have a vending presence at Eglin Air Force Base, nor does it receive any income from Eglin AFB pursuant to the income sharing provisions of the Act.<sup>44</sup>

21. Donald Meloy, Marketing Manager for the SLA, had previously spoken with Mr. Wong about establishing a blind vending facility at Eglin AFB.<sup>45</sup> Mr. Meloy presented unopposed testimony indicating that Mr. Wong had asked what commission the SLA would pay to Eglin AFB on vending machine sales if machines were to be operated by a blind vendor.<sup>46</sup> Mr. Meloy’s efforts to establish a blind vending facility at Eglin AFB were unsuccessful.<sup>47</sup> His further efforts to correspond with Mr. Wong were ignored.<sup>48</sup>

22. On December 18, 2015, the SLA submitted to Eglin AFB an Application and Permit for the Establishment of a Vending Facility on Federal Property (“Permit”).<sup>49</sup> The Permit submitted by the SLA requested that the SLA be allowed to install 26 snack vending machines and 33 drink vending machines in a number of Air Force facilities on Eglin AFB.<sup>50</sup> Only one facility, Building 2825, the Hospital, listed on the permit application is the worksite of 100 or more Federal Government employees.<sup>51</sup> No other facilities on the permit application are the worksite for 100 or more Federal Government

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<sup>42</sup> *Id.*

<sup>43</sup> Tr. 73:17-22.

<sup>44</sup> *Id.*

<sup>45</sup> Tr. 98: 7-21.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Tr. 105:4-6.

<sup>49</sup> *J. Stip.* at 3

<sup>50</sup> *Id.*

<sup>51</sup> *Resp. Ex M. Declaration of Roger C. Wong*

employees.<sup>52</sup> Eglin AFB personnel received the Permit application.<sup>53</sup> The SLA does not currently operate any vending facilities on Eglin AFB.<sup>54</sup>

23. The SLA attempted to contact several personnel at Eglin AFB to see if there had been any decision on the Permit in February and March 2016.<sup>55</sup> At the time of the hearing, the SLA had not received a response to the Permit application from Eglin AFB.<sup>56</sup> On December 21, 2016, Eglin AFB responded to the SLA in writing and granted the SLA a permit for Building 2825, the Hospital.<sup>57</sup> Once the letter and permit is signed/approved by Brigadier General Azzano's staff for final signature, Eglin AFB will promptly provide the documents to the SLA.<sup>58</sup>

24. On June 6, 2016, the SLA submitted an amended request for arbitration to the U.S. Department of Education, alleging that the SLA had not received a response to multiple inquiries to Eglin AFB regarding the Permit and requesting that this issue be combined with the existing arbitration.<sup>59</sup> The SLA's amended request for arbitration was granted by the U.S. Department of Education.<sup>60</sup>

25. Mr. Meloy and a co-worker from the Division conducted a site visit at Eglin AFB in 2016.<sup>61</sup> Mr. Meloy has worked with other states' SLAs to establish blind vending facilities on military installations.<sup>62</sup> Based upon his experience, as well as his understanding that Eglin AFB is one of the largest bases in the United States, Mr. Meloy believes that a blind vending facility could be supported at Eglin AFB.<sup>63</sup>

26. In his discussions with Eglin AFB, Mr. Meloy testified that the presence of vending machines operated by the Army and Air Force Exchange Service ("AAFES")

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Letter from Brigadier General Azzano and Permit for Vending w/attachments* dated December 19, 2016.

<sup>58</sup> Resp. supplement to Resp. Post Arbitration Brief dated 16 December 2016.

<sup>59</sup> *J. Stip.* at 3.

<sup>60</sup> *Id.*

<sup>61</sup> TDr. 102:5-19.

<sup>62</sup> Tr. 96:6-10; T101:20-24.

<sup>63</sup> Tr. 101:10-24.

was mentioned as a factor in whether vending machines operated by a blind vendor could be placed in a given building.<sup>64</sup> In Mr. Meloy's opinion, vending machines operated by the SLA and AAFES can co-exist.<sup>65</sup> But during his site visit, Mr. Meloy believed that locations including vending facilities operated by AAFES were not available to the SLA.<sup>66</sup>

27. Vending machines at Eglin AFB currently are operated under both AAFES and Morale, Welfare, and Recreation (MWR) programs.<sup>67</sup>

*Summary of Panel Decision for Dining Hall Services Contract*

28. The issue in this arbitration is whether the Air Force violated the RSA when it did not establish a competitive range, determined that the SLA's proposal price was unreasonable, and made an award decision without discussions. As a result of this position, the Air Force did not apply the RSA priority and award to the SLA. The panel rules that the SLA's waived its objection to the terms of the solicitation when the SLA failed to object to the terms of the solicitation in a timely manner. In addition, the panel also rules:

- (a) The Air Force conducted its source selection in a manner consistent with the terms of the solicitation.
- (b) The contracting officer's determination that the SLA's total evaluated price without setting a competitive range was reasonable and consistent with the terms of the solicitation.
- (c) The SLA waived its rights to object to the terms of the solicitation and the award was made in a manner consistent with the solicitation.

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<sup>64</sup> Tr. 104:10-14.

<sup>65</sup> Tr. 103:1-20.

<sup>66</sup> Tr. 106:15-24.

<sup>67</sup> Tr. 111:13-15.

(d) Based on the facts presented to the panel, the SLA failed to establish that the contracting officer's decision to not apply the RSA priority and award to the SLA was a violation of the RSA;

(e) Therefore, the panel denies the SLA's request for relief on this issue.

### *Analysis*

29. The solicitation authorized the award of a contract without discussions and the SLA did not object to the conditions included in the solicitation prior to the due date for proposals. The SLA along with all other offers were put on notice that award without discussions was a possibility. The contracting officer determined that the SLA's proposal was technical acceptable and its past performance was acceptable.<sup>68</sup> Without setting a competitive range, the contracting officer determined that the SLA's total evaluated price was not reasonable.<sup>69</sup> Acorn Food Services, Inc. (Acorn) provided the lowest total price, while the SLA proposed the fifth highest price.<sup>70</sup> The contracting officer determined that Acorn's bid was technically acceptable and that its past performance was also acceptable.<sup>71</sup> Contract No. FA2823-15-1C-3007 ("Contract") was awarded to Acorn on April 8, 2015.<sup>72</sup>

30. The RSA requires blind vendors to obtain a license from a State Licensing Agency (SLA), which in turn selects the location for such facility and the type of facility to be provided, and then assigns blind vendors to operate the facility. Cafeterias on military bases, such as the Fort Sill dining facilities, are considered vending facilities. In contrast to stand-alone vending facilities owned by the SLA and/or its licensee, the federal government determines the location of cafeterias and dining hall facilities. The services to be provided are defined by the federal government in a Performance Work Statement (PWS) this is included in the contract awarded to provide these services. The

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<sup>68</sup> *Findings of Fact Para. 9.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Findings of Fact Para. 10.*

SLA is paid according to the terms of a federal contract with appropriated funds authorized by Congress and specific appropriations statutes.

31. The RSA grants a priority during the source selection process to blind entrepreneurs to operate vending facilities, including cafeterias, on federal properties when the Secretary of the Department of Education “determines, on an individual basis, and after consultation with the appropriate property managing department, agency, or instrumentality, that such operation can be provided at a reasonable cost, with food of a high quality comparable to that currently provided employees, whether by contract or otherwise. Such operation shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible.”<sup>73</sup>

32. The implementing RSA regulations provide that “in order to establish the ability of blind vendors to operate a cafeteria in such a manner as to provide food service at comparable cost and of comparable high quality as that available from other providers of cafeteria services, the appropriate State licensing agency shall be invited to respond to solicitation for offers when a cafeteria contract is contemplated by the appropriate property managing department, agency, or instrumentality. Such solicitation for offers shall establish criteria under which all responses will be judged. Such criteria may include sanitation practices, personnel, staffing, menu pricing and portion sizes, menu variety, budget and accounting practices. If the proposal received from the State licensing agency is judged to be within a competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section. If the State licensing agency is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary under the provisions of §395.37.”<sup>74</sup>

33. A contracting officer is a person with authority to enter into, administer, and/or terminate contracts and make related determinations and findings.<sup>75</sup> A contracting

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<sup>73</sup> 34 CFR § 395.33(a)

<sup>74</sup> 34 CFR § 395.33(b)

<sup>75</sup> FAR 1.602-1(a) Defining the authority of a contracting officer.

officer is not authorized to enter into a contract “unless the contracting officer ensures that all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.”<sup>76</sup>

34. The FAR further defines the responsibilities of a contracting office to include responsibility for “ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. In order to perform these responsibilities, contracting officers are allowed wide latitude to exercise business judgment.”<sup>77</sup> Additionally, a contracting officer has “no authority to make any commitments or changes that affect price, quality, quantity, delivery, or other terms and conditions of the contract nor in any way direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions.”<sup>78</sup>

35. A contracting officer’s decisions regard the process for the selection of a contractor and the process for award of a contract are broad. Those decisions include the application of statutes, such as the RSA, to the particular procurement action.

36. It is a fact that the Air Force applied the FAR to this acquisition and the SLA did not object to the use of the FAR to control the process for source selection under this acquisition. The Air Force also crafted specific language to address the application of the RSA to this procurement action. While the DoE has the authority under its enabling statute to issue implementing regulations that define the process for the award of a dining hall services contract subject to the RSA, the DoE has not implemented FAR type regulations that instruct a contracting officer on the process to be used to make an award determination.<sup>79</sup>

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<sup>76</sup> FAR 1.602-1(b)

<sup>77</sup> FAR 1.602-2 Expands on the responsibilities of a contracting officer.

<sup>78</sup> FAR 1.602-2(5)

<sup>79</sup> Title 34 CFR Part 395—VENDING FACILITY PROGRAM FOR THE BLIND ON FEDERAL AND OTHER PROPERTY is the implementing regulations for the RSA. While the regulations include specific instructions for the issuance and management of a permit for the operation of vending machines on federal property, they do not include similar FAR type instructions and regulations for the obligation of federal funds.

37. The FAR is a system of administrative regulations that authorize the contracting officer to award a contract.<sup>80</sup> The FAR is a codification of acquisition policy that apply to ALL executive agencies.<sup>81</sup> The RSA and its implementing regulations are not part of the FAR system and as a result, procuring contracting officers must attempt to determine if the RSA applies to a particular procurement and if so, how that interaction with the FAR impacts the legal authorities necessary to award a contract for dining hall services.

38. The DoE has not defined the term “competitive range” nor has the DoE established regulations to require the establishment of a competitive range and the Air Force put the SLA on notice of the potential for award without discussions, the panel has decided the SLA failed to object in a timely manner to the source selection process included within the Air Force solicitation and the SLA waived any objection it may have had to the use of these source selection terms in making an award decision. Therefore, the SLA has failed to meet its burden of proof that the Air Force violated the RSA by failing to establish a competitive range and making an award without discussions as allowed by the terms of the solicitation. The panel also determines that the Air Force conducted the source selection in a manner consistent with the terms of the solicitation.

39. The panel has determined that the SLA’s objections to the terms of the solicitation are not timely and have been waived by the SLA. The waiver rule has been applied to cases involving the RSA.<sup>82</sup> In support of the Court’s decision in *Blue & Gold Fleet*, the Court relied on the decision in *North Carolina Division of Services for the*

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<sup>80</sup> FAR 1.000 – Scope of Part. This part sets forth basic policies and general information about the Federal Acquisition Regulations System including purpose, authority, applicability, issuance, arrangement, numbering, dissemination, implementation, supplementation, maintenance, administration, and deviation. Subparts 1.2, 1.3, and 1.4 prescribe administrative procedures for maintaining the FAR System.

<sup>81</sup> FAR Subpart 1.101 Purpose, Authority, Issuance, 1.101 – Purpose. The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR. The FAR System does not include internal agency guidance of the type described in 1.301(a)(2).

<sup>82</sup> *North Carolina Division of Services for the Blind v. United States*, 53 Fed. Cl. 147 (Fed. Cl. 2002); *Moore’s Cafeteria Services v. United States*, 77 Fed. Cl. 180 (Fed. Cl. 2007).

*Blind* which held where there is a “deficiency or problem in a solicitation ... the proper procedure for the offeror to follow is not to wait to see if it is the successful offeror before deciding whether to challenge the procurement, but rather to raise the objection in a timely fashion.”<sup>83</sup>

40. The panel concurs with the rationale of the United States Court of Appeals, Federal Circuit in *Blue & Gold Fleet*, where the court stated the following:

Similarly, we have recognized the doctrine of patent ambiguity where the party challenging the government is a party to the government contract. "The doctrine of patent ambiguity is an exception to the general rule of contra proferentem, which courts use to construe ambiguities against the drafter." *E.L. Hamm & Assocs., Inc. v. England*, 379 F.3d 1334, 1342 (Fed.Cir.2004). We have applied the doctrine of patent ambiguity in cases where, as here, a disappointed bidder challenges the terms of a solicitation after the selection of another contractor. See *Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1381 (Fed.Cir.2000); *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1582 (Fed.Cir.1996). Under the doctrine, where a government solicitation contains a patent ambiguity, the government contractor has “a duty to seek clarification from the government, and its failure to do so precludes acceptance of its interpretation” in a subsequent action against the government. *Stratos*, 213 F.3d at 1381 (quoting *Statistica*, 102 F.3d at 1582). This doctrine was established to prevent contractors from taking advantage of the government, protect other bidders by assuring that all bidders bid on the same specifications, and materially aid the administration \*1314 of government contracts by requiring that ambiguities be raised before the contract is bid, thus avoiding costly litigation after the fact. *Cnty. Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1580 (Fed.Cir.1993).

### **Vending Machine Issue**

40. The panel was asked to determine whether or not the EAFB violated the Randolph-Sheppard Act and its implementing regulations when it neither approved nor disapproved the permit the vending machines. The SLA submitted a vending permit application on December 18, 2015. Subsequent to the hearing on this issue, EAFB approved a vending machine permit for the installation hospital. Since the government has provided a response that granted a permit in response to the SLA’s application, this request for relief is moot. The panel is encouraged by Eglin AFB’s decision to grant a

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<sup>83</sup> *Blue & Gold Fleet*, 493 F.3d at 1315 (quoting *North Carolina Division of Services for the Blind*, 53 Fed. Cl. at 165).

permit, even though the approval has been slow in working its way through the review and approval process. Whether or not the response by the Air Force is adequate was not a matter before the panel.

41. While the Air force has a continuing obligation to negotiate in good faith with the SLA regarding the establishment of vending facilities, whether or not the SLA is entitled to the placement of additional vending facilities on EAFD is not a matter before the panel. In the event the parties cannot agree on the location and placement of addition vending machines on Eglin AFB, the SLA has the option of requesting arbitration to address that specific issue.

42. Additionally, Petitioner requested the Panel to consider the issue of Respondent's failure to share vending machine income as required by 34 C.F.R. § 395.32. the Panel finds that Petitioner did not identify this as an issue when requesting the Department of Education to convene an Ad Hoc Arbitration Panel. Therefore, it is beyond the scope of these proceeding and the Panel will make no ruling.

43. The Panel strongly urges the Department of Education to promulgate regulations that address the interaction of the RSA and agency procurement regulations (the FAR and its supplements); thus avoiding the multiple arbitration and Court cases that have arisen as others have attempted to resolve the issue through the court system. The cost for issuance of such regulations would most certainly be less than the cost of the repeated litigation that has ensued since the passage of the RSA and its various amendments.

Dated:

/s Dr. John McCallister, Panel Chair

/s Steven R. Fuscher, Panel Member

UNITED STATES DEPARTMENT OF  
EDUCATION REHABILITATION  
SERVICES ADMINISTRATION

FLORIDA DEPARTMENT OF  
EDUCATION, BLIND SERVICES

Petitioner,

v.

Case No. R-S/15-13

UNITED STATES AIR FORCE,  
EGLIN AIR FORCE BASE

Respondent.

**DISSENTING OPINION**

Pursuant to 20 U.S.C. §107, *et seq.* (commonly referred to as the Randolph-Sheppard Act and hereinafter referred to as “the Act”), this arbitration Panel was convened on November 15, 2016, on the Eglin Air Force Base in Florida. The impetus for the Panel was a complaint letter dated April 24, 2015, sent by the Florida Department of Education, Division of Blind Services, to the U.S. Department of Education requesting the convening of an Ad Hoc Arbitration Panel pursuant to the Act.

Mr. John McCollister served as Chair of the Panel, and Terry C. Smith and Steven R. Fuscher served as panel members appointed by the respective parties. Brent McNeal, Esq. appeared as counsel for the Petitioner. Kevin Normile, Esq., Joseph Loman, Esq., and William Paulson, Esq. represented the Respondent. Mr. William Findley and Donald Meloy were called by the Petitioner to provide testimony. Mr. Ronald Wilson testified on behalf of the Respondent.

In addition, Exhibits 1-16 were introduced by the Petitioner. The Respondent objected to Exhibit 16. It was agreed that after hearing testimony the Panel could decide what if any weight to give to the exhibit in question. Respondent introduced Exhibits 1-19.

This dissenting opinion is presented because the Majority essentially ignored the Randolph-Sheppard regulations in rendering its decision.

### **THE ISSUES**

The parties agreed that the issues to be decided by this panel are as follows:

1. Did Eglin AFB afford the SLA its priority as provided for in the Randolph-Sheppard Act and its implementing regulations? If not, what is the appropriate remedy?
2. Did Eglin AFB violate the Randolph-Sheppard Act and its implementing regulations when it neither approved nor disapproved the permit for vending machines submitted by the State Licensing Agency? If so, what is the appropriate remedy?

In its Pre-Hearing Brief, Petitioner raised the issue that Respondent had failed to share vending machine income as required by 34 C.F.R. 395.32.

Petitioner argues that this is part of Issue #2 and that the Panel has the authority to render a decision regarding this additional alleged violation of the Act.

Respondent counters that it is an entirely new issue raised for the first time in the Pre-Hearing Brief and is, therefore, not appropriate for this Panel. At the time of

the hearing, the Panel did not issue a ruling as to the appropriateness of this issue being considered. The matter will be addressed later in this decision.

It was agreed that the Petitioner bears the Burden of Proof in regards to the alleged violations of the Act.

### **FINDINGS OF FACT**

The parties stipulated to the following facts:

**ISSUE 1: Did Eglin AFB afford the SLA its priority as provided for in the Randolph-Sheppard Act and its implementing regulations? If not, what is the appropriate remedy?**

1. On February 17, 2015, Solicitation No. FA2823-15-R-3004 was posted to the Federal Business Opportunities (FBO) website, [www.fbo.gov](http://www.fbo.gov). The solicitation required the contractor to provide all personnel, supervision, and any items and services necessary to perform Full Food Services for the Lightning Dining Facility at Eglin Air Force Base, Florida.

2. Solicitation No. FA2823-15-R-3004 informed all offerors that the competition was a competitive Lowest Price Technically Acceptable (LPTA) source selection in which competing offeror's technical proposal, past performance history, and cost or price considerations would be considered.

3. Solicitation No. FA2823-15-R-3004 stated that award would be made to the responsible offeror who submitted a proposal that (1) conformed to the requirements of the solicitation; (2) received a rating of "Acceptable" on both the Technical and Past Performance evaluation factors; and (3) had the lowest Total Evaluated Price (TEP), provided that the TEP was not unbalanced and was reasonable. However, award would go to the State Licensing Agency (SLA) in

accordance with the Randolph-Sheppard Act, provided that the SLA's proposal was technically acceptable, their past performance was determined to be acceptable, and their TEP was complete, reasonable, and balanced.

4. The Solicitation informed the offerors that the Air Force intended to award the contract without discussions with respective offerors. Solicitation No. FA2823-15-R-3004 further stated that:

By submission of its offer, the offeror accedes to all solicitation requirements, including terms and conditions, representations, and certification, and technical requirements, in addition to those identified as evaluation factors or subfactors. Offerors must clearly identify any exceptions to the solicitation terms and conditions and provide complete accompanying rationale.

5. The Solicitation made no mention of the term "competitive range."

6. In accordance with the Solicitation, all offers were due by March 19, 2015. On March 19, 2015 seven (7) offers were received in response to Solicitation No. FA2823-15-R-3004. The Florida Department of Education, Division of Blind Services (FLDOE), a State Licensing Agency (SLA) under the Randolph-Sheppard Act (R-SA), submitted an offer in response to Solicitation No. FA2823-15-R-3004.

7. In accordance with the evaluation procedures in the solicitation, all offers were ranked in order of price. Acorn Food Services, Inc. (Acorn) provided the lowest total price while the SLA proposed the fifth highest price.

	Offeror	Base Year	Option 1	Option 2	Option 3	Option 4	Total
	IGE	935,350.50	940,853.75	946,391.06	951,962.65	1,141,665.29	4,916,223.25
<b>1</b>	<b>Acorn</b>	<b>829,817.00</b>	<b>894,764.00</b>	<b>894,764.00</b>	<b>894,764.00</b>	<b>962,000.00</b>	<b>4,476,109.00</b>
2	REDACTED	906,111.00	975,212.00	975,212.00	975,212.00	975,212.00	4,806,959.00
3	REDACTED	935,093.12	1,014,116.84	1,013,914.64	1,018,156.16	1,022,524.76	5,003,805.52
4	REDACTED	985,360.12	983,451.80	986,605.28	989,822.00	1,059,882.32	5,005,121.52
<b>5</b>	<b>SLA</b>	<b>1,107,528.92</b>	<b>1,107,528.92</b>	<b>1,107,528.92</b>	<b>1,107,528.92</b>	<b>1,179,882.44</b>	<b>5,609,998.12</b>

	Offeror	Base Year	Option 1	Option 2	Option 3	Option 4	Total
6	REDACTED	1,080,753.87	1,177,186.04	1,177,186.04	1,177,186.04	1,177,186.04	5,789,498.03
7	REDACTED	1,229,020.25	1,227,904.76	1,227,906.08	1,227,906.08	1,227,907.40	6,140,644.57

8. After ranking all seven offers by total evaluated price, the lowest priced offer was then evaluated for technical and past performance acceptability. No competitive range was set.

9. Acorn submitted the lowest total evaluated price. As such, the Contracting Officer (CO) evaluated Acorn for technical and past performance acceptability. The CO determined that Acorn was technically acceptable and that its past performance was also acceptable.

10. In accordance with the Solicitation, the proposal submitted by the SLA was then evaluated to determine if its offer was technically acceptable, its past performance acceptable, and its TEP was complete, reasonable, and balanced.

11. The CO determined that the SLA's proposal was technically acceptable and its past performance was acceptable. However, the SLA's proposed total price of \$5,609,998.12 was 25.33% (\$1,133,889.12) higher than the awardee Acorn, and 14% higher than the Independent Government Estimate (IGE). Accordingly, the CO determined that the SLA's total evaluated price was not reasonable.

12. Contract No. FA2823-15-C-3007 was then awarded to Acorn on April 8, 2015.

13. On April 9, 2015, a debriefing letter was sent to the SLA. On April 14, 2015 the CO received a request for debriefing from the SLA. On April 16,

2015 the CO responded to the SLA via email requesting specific questions regarding their proposal or the process be submitted in writing for Air Force review prior to setting up a time/date to discuss.

14. On April 20, 2015 the SLA submitted an Agency Level Protest. The basis for its protest was that Eglin AFB failed to consult with the U.S. Department of Education as required under the R-SA, that the SLA's offer was reasonable, and that Acorn's offer was unreasonable.

15. On April 24, 2015, the SLA submitted a request to the U.S. Department of Education to convene an Ad Hoc Arbitration Panel pursuant to the Randolph-Sheppard Act.

16. On May 21, 2015, the Agency Level Protest was denied in its entirety.

17. On or about September 28, 2015, the SLA received a letter from Janet LaBreck, Commissioner of the Rehabilitation Services Administration of the U.S. Department of Education, authorizing the convening of an arbitration panel to hear and render a decision on the issues raised in the SLA's letter requesting arbitration.

**ISSUE 2: Did Eglin AFB violate the Randolph Sheppard Act and its implementing regulations when it neither approved nor disapproved the permit for vending machines submitted by the State Licensing Agency? If so, what is the appropriate remedy?**

18. On December 18, 2015, the SLA submitted to Eglin AFB an Application and Permit for the Establishment of a Vending Facility on Federal Property ("Permit"). The permit was received by Eglin AFB personnel.

19. The Permit submitted by the SLA requested that it be allowed to install 26 snack vending machines and 33 drink vending machines in a number of Air Force facilities on Eglin AFB. The list submitted by the SLA in Attachment B of its permit included 31 different locations.

20. The SLA attempted to contact several personnel at Eglin AFB to see if there had been any decision on the Permit in February and March 2016. The SLA has never received a response to the Permit application.

21. On June 6, 2016, the SLA submitted an amended request for arbitration to the U.S. Department of Education, alleging that the SLA had not received a response to multiple inquiries to Eglin AFB regarding the Permit and requesting that this issue be combined with the existing arbitration. The SLA's amended request for arbitration was granted by the U.S. Department of Education.

22. The SLA and the Air Force made a good-faith effort to reach a settlement of the issues involved in this arbitration. Two individuals representing the SLA came to Eglin AFB to conduct a site visit.

23. Other than documents related to this arbitration, the Air Force has not provided to the Secretary any written correspondence regarding the placement of vending machines by the SLA at Eglin AFB.

24. The SLA does not currently operate any vending facilities on Eglin AFB.

Additionally, the Panel made the following Findings of Fact:

25. The U.S. Department of Education, Rehabilitation Services Administration, is the Federal agency charged by Congress to administer the Randolph-Sheppard Program nationally and to promulgate regulations to carry out the purpose of the Act.

26. The U.S. Department of Education designates a state licensing agency (SLA) in each state to administer the Randolph-Sheppard Program. The Florida Department of Education, Division of Blind Services, has been designated as the SLA for the State of Florida.

27. Congress enacted the Randolph-Sheppard Act for the stated purpose of “providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting.”

28. The purpose of the Act is achieved through regulations promulgated by the U.S. Department of Education that require the establishment of one or more vending facilities when feasible to be operated by the blind on all Federal properties provided that such an operation would not adversely affect the interests of the United States.

29. Eglin AFB is a Federal entity covered by the Randolph-Sheppard Act. 34 C.F.R. 395.30(a) requires Eglin AFB to “take all steps necessary to assure that, wherever feasible, in light of appropriate space and potential patronage, one or more vending facilities for operation by blind licensees shall be located on all Federal property” at Eglin AFB.

30. 34 C.F.R. 395.16 requires the SLA to submit an application for a permit for the operation of a vending facility, other than a cafeteria, to the head of the Federal property managing department, agency, or instrumentality. The head of the Federal property managing department shall either approve or not approve the application. If the application is not approved, the Federal entity must advise the SLA in writing as to the reasons.

31. In the case at hand, the Respondent has made no claim that a vending facility operated by the blind would in any way adversely affect the interests of the United States.

32. In addition to there being no vending facilities being operated by blind vendors at Eglin AFB, Respondent does not currently share with Petitioner any income from vending machines as required by 34 C.F.R. 395.32.

33. 34 C.F.R. 395.32(i) exempts from the income sharing provision of the law machines operated under the control of the post exchange.

34. Vending machines at Eglin AFB are currently operated by both the post exchange (AFES) and Morale, Welfare, and Recreation (MWR) Program.

35. Congress amended the Randolph-Sheppard Act in 1974 and specifically included cafeterias in the definition of a vending facility and extended the priority for the blind to such cafeterias.

36. The full food service operation at issue in this case is considered to be a “cafeteria” as defined at 34 C.F.R. 395.1(d) and constitutes a “vending facility” as defined at 34 C.F.R. 395.1(x).

37. The Act requires that cafeterias such as the full food service facilities at Eglin AFB be operated under a contract, while other vending facilities, including vending machine operations, are operated pursuant to a permit.

38. Cafeteria contracts are awarded through a competitive bid process unless the Federal entity elects to directly negotiate with the state licensing agency, which it has the express authority to do under 34 C.F.R. 395.33(d).

39. Permits, on the other hand, are noncompetitive, and the state licensing agency has a “prior right” or right of first refusal to provide all vending facility services other than cafeterias.

40. Solicitation No. FA2823-15-R-3004 stated that the solicitation conformed to the requirements of the Randolph-Sheppard Act.

41. When soliciting proposals for cafeteria services, the proposal submitted by the SLA is given priority if it is judged by the Federal entity to be within a competitive range and has a reasonable chance of being selected. If the state licensing agency’s proposal is within that established competitive range, the Federal entity is required to consult with the Secretary of Education for a final

determination that the SLA can provide food of a high quality at a reasonable price, 34 C.F.R.395.33(b).

42. When soliciting proposals for the full food service contract at Eglin AFB, the Respondent did not establish a competitive range and did not consult with the Secretary of Education.

43. 34 C.F.R. 395.37 establishes the arbitration process to resolve disputes between state licensing agencies and Federal entities. If the panel makes a determination that a Federal entity has violated the Act, the Federal entity shall cause such violations to cease and shall take whatever actions are necessary to carry out the decision of the Panel.

44. On or about December 19, 2016, the Petitioner and Respondent both timely filed Post-Arbitration Briefs.

45. On or about December 21, 2016, Respondent filed a Supplement to its Post-Arbitration Brief stating that Respondent had responded to Petitioner's application for a permit and requesting that Issue #2 be dismissed.

46. On or about December 22, 2016, Petitioner filed a response to Respondent's Post Arbitration Brief, arguing the Panel should not consider the Supplement as it was not timely filed and still failed to provide reasons for denying the permit, which is a requirement of the Act.

## CONCLUSIONS OF LAW

### Issue #1

1. Solicitation No. FA2823-15-R-3004 for full food services at Eglin AFB was a solicitation for a vending facility contract, and in particular for a contract for the operation of a cafeteria, to which the Randolph-Sheppard Act, 20 U.S.C. §§ 107-107f, and its implementing regulations found at 34 C.F.R. Part 395 apply. This Panel was charged with the responsibility of determining whether the Act or the implementing regulations were violated in the awarding of the contract for full food services at Eglin AFB.

2. The Respondent argues that the Federal Acquisition Regulations (FAR) and Defense Federal Acquisition Regulations (DFAR) govern the procurement and that the award was made in strict compliance with both the FAR and DFAR. The Panel Minority believes that the contracting officer did comply with the FAR and DFAR this case; however, compliance with the FAR and DFAR is not the issue before this Panel. Congress created additional procurement requirements when it passed the Randolph-Sheppard Act, and the FAR and DFAR are secondary when awarding contracts pursuant to the priority afforded by the Act. Respondent is correct to adhere to the FAR and DFAR when soliciting proposals for full food service. However, with respect to the application of the priority afforded to blind entrepreneurs, the Department of Education regulations are controlling. In this case, Respondent was obligated to refer to 34 C.F.R. § 395.33 for guidance on how the priority should be applied, in

conjunction with the FAR and DFAR, to the procurement of a contract for the operation of a cafeteria.

3. The Petitioner did not waive its rights to challenge the terms of the solicitation by submitting its proposal. Since the solicitation itself said the Act applied to the procurement, the Petitioner had no reason to challenge the award. It wasn't until after the award that the Petitioner learned that a violation of the Act had occurred. In regard to Respondent's claim that Petitioner knew no competitive range was going to be established because the solicitation made it clear the award would be made "without discussion," the intent not to establish a competitive range was not clear. The term "without discussion" is not found in the Act and had no significance to the Petitioner. Respondent relies on *Blue and Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007), and *North Carolina Division of Services for the Blind v. United States*, 53 Fed. Cl. 147 (Fed. Cl. 2002), to argue that Petitioner sat on its rights and should have challenged the terms of the solicitation prior to submitting its proposal. The Panel Minority is convinced that the Petitioner did not sit on its rights waiting to see if it was awarded the contract. Petitioner believed the contract would be awarded pursuant to the Act, and it was not until after the award that it discovered the alleged violation of the Act. Petitioner relies on *Henderson v. Tollet*, 342 F. Supp. 113, 119 (M.D. Tenn. 1971), *aff'd* 459 F.2d 237 (6<sup>th</sup> Cir. 1972), *rev'd on other grounds*, 411 U.S. 258 (1973), in support of its position that one must knowingly waive or abandon a right, and asserts that, in this case, it did not knowingly do so since it had no reason to believe the solicitation was not being

conducted in full compliance with the Act. The Panel Minority is swayed by *Henderson* and concurs with Petitioner's analysis. Furthermore, even if Petitioner had known in advance, that would not preclude it from seeking relief from this Panel, as the arbitration process is the proper forum to resolve disputes involving the Randolph-Sheppard Act.

4. The Minority is also concerned that the Panel Majority has effectively denied the Petitioner its right to due process. The Secretary of the Department of Education specifically convened this Panel to determine if there had been a violation of the Randolph-Sheppard Act. The Majority effectively overruled the Secretary and denied the Petitioner its day in court.

5. Respondent was required by 34 C.F.R. § 395.33(b) to establish a competitive range in order to judge the competitiveness of Petitioner's proposal. Only by establishing a competitive range and consulting with the Secretary can the Federal property manager determine, as required by § 395.33(b), whether the State licensing agency's bid was reasonably priced and offered food of a high quality. A contracting entity cannot circumvent the priority afforded to blind entrepreneurs by not establishing a competitive range. The establishment of the competitive range is mandatory and not permissive. The Panel Minority takes note of the United States Federal Court of Claims decision in *Kentucky v. United States*, 62 Fed. Cl. 443, 447 (2004), in which this very issue was discussed. The Court found that it was the competitive range that triggers the priority.

Respondent countered that if a competitive range had been established, Petitioner's bid would not have fallen within that range because its bid was not

reasonable. Respondent further argued that if the Petitioner's proposal had been reasonable, it would have been awarded the contract even if it was not the lowest bid. Contracting Officer Ronald Wilson testified that the Petitioner's proposal was technically sound but was \$1,133,889.12, or 25.33%, higher over the life of the contract than the lowest bid. Mr. Wilson testified that this was not reasonable. When asked what would have been reasonable, Mr. Wilson was unable to give a dollar amount or percentage. This is precisely why a competitive range should have been established on the front end. Had a competitive range been established, Respondent might have been right. Petitioner's proposal might not have been within it, and these proceedings would not have been necessary. The Panel Minority is cognizant of the fact Petitioner's bid was significantly higher than the winning bid. However, it is not the Panel's role to determine whether or not Petitioner's proposal was reasonable. The Panel should only be concerned with the process followed and whether that process complied with the Act.

The Panel does not have to determine whether or not Respondent was deliberately trying to circumvent the Randolph-Sheppard Act and the priority it affords to blind entrepreneurs. However, by failing to establish a competitive range, that is exactly what occurred, albeit unintentionally. If Respondent were allowed in this case to ignore the requirement to establish a competitive range, that would be a road map to all Federal entities and contracting officers on how to avoid the Randolph-Sheppard priority and simply award contracts to the lowest bidder.

The Panel notes that this is not the first time the issue of a Federal entity failing to establish a competitive range has come before an arbitration panel. *In Maryland State Dep't of Education v. General Services Administration*, Case 13-06 (November, 2015), GSA employed the same strategy as did the Respondent in this case and did not establish a competitive range choosing to award the contract "without discussions." GSA argued that the priority only applies if the proposal is within the competitive range and that, since it established no competitive range, the priority did not apply. The Panel in that case disagreed and ruled in favor of the Maryland State Department of Education. The Panel Minority in this case concurs with the reasoning of the *Maryland* panel and is of the opinion that the same reasoning applies here. The contracting officer must establish a competitive range for the purposes of evaluating the SLA's proposal.

6. The issue of the Respondent failing to consult with the Secretary of Education is moot. 34 C.F.R. § 395.33(b) requires the Federal contracting entity to consult with the Secretary if the SLA's proposal is within the competitive range. The required process is (1) Establish the competitive range; (2) Determine whether the SLA's proposal is within that competitive range; and, (3) If so, consult with the Secretary. Without Steps 1 and 2, Step 3 cannot occur. Therefore, the Panel does not have to rule on the issue of whether or not Respondent violated the Act by failing to contact the Secretary.

## Issue #2

7. 34 C.F.R. § 395.16 requires the SLA to submit an application for a permit (for a vending facility other than a cafeteria) to the head of the Federal property managing department, agency, or instrumentality. The head of the Federal property managing department shall either approve or disapprove the application. If the application is not approved, the Federal entity must advise the SLA in writing as to the reasons for the denial. Ignoring an application for a permit is not an option. The Federal entity has a legal responsibility to approve the application unless there is good cause not to.

8. 34 C.F.R. § 395.30(a) requires a Federal entity to

*“take all steps necessary to assure that, wherever feasible, in light of appropriate space and potential patronage, one or more vending facilities for operation by blind licensees shall be located on all federal property Provided that the location and operation of such facility or facilities would not adversely affect the interests of the United States. Blind persons licensed by State licensing agencies shall be given priority in the operation of vending facilities on any federal property.”*

See also 107 U.S.C. §107(b)(2). The Panel Minority notes that the Act and regulations require that vending facilities operated by blind entrepreneurs be located on **all** Federal properties and blind licenses are to be given a priority on **any** Federal property. This requires the Federal entity to be proactive in creating opportunities for blind entrepreneurs. The only exception is when the placement of such vending facility or vending facilities would adversely affect the interests of the United States, 20 U.S.C. § 107(b)(2). If a Federal entity makes the determination that the interests of the United States would be adversely affected, it must justify that finding, in writing, to the Secretary of Education, who must then

determine whether such limitation is justified. *Id.* § 107(b). This would be a very high standard to meet, and Respondent has not even attempted to meet it in regards to the establishment of one or more vending facilities at Eglin AFB.

9. 34 C.F.R. § 395.31, “Acquisition and Occupation of Federal Property,” does not provide an exemption to the priority for buildings that house fewer than 100 Federal employees or have less than 15,000 square feet. This provision simply relieves the Federal entity of any obligation to include space for a vending facility when occupying new space if there are fewer than 100 Federal employees or less than 15,000 square feet. Congress did not want to place a burden on a Federal entity to provide space for a vending facility in smaller buildings when acquiring new space either through construction, purchase, or lease. Having to provide space for a vending facility could make it difficult for the Federal Government to acquire space for smaller numbers of employees. However, if space is available and the SLA wants to establish a vending facility and/or the Federal entity desires the establishment of a vending facility, the priority afforded to blind licensees by the Act is still applicable. The Panel Minority takes notice of *Arizona Department of Economic Security v. the United States Postal Service*, R-S Case No. 06-3 (May, 2008), an arbitration case that addressed the issue of the applicability of the Act’s priority to properties with fewer than 100 Federal employees or less than 15,000 square feet. That Panel ruled the priority applied to such properties and that the Postal Service did not have the freedom to secure vending on such properties from other sources without granting the first right of refusal to the SLA. The Panel Minority also

takes note of Petitioner's Exhibit No. 16, which is the April 28, 2016, letter from the Secretary of the U.S. Department of Education to Congressman Jolly. This is the exhibit to which Respondent objected, but the Panel believes the content of that letter is relevant to the issue before this Panel. In that letter, the Department of Education addresses the question of what responsibility a Federal entity has if there are fewer than 100 Federal employees or less than 15,000 square feet of space. According to the Department of Education's response to the Congressman, such properties are not exempt from the priority.

### **OPINION**

1. The Panel Minority finds that Respondent violated the Randolph-Sheppard Act when it failed to establish a competitive range when soliciting proposals for full food services.

2. The Panel Minority finds that Respondent violated the Randolph-Sheppard Act when it neither approved nor disapproved Petitioner's application for a permit to operate vending facilities. The Panel acknowledges that Respondent did finally reply to Petitioner after these proceedings were concluded and the Panel was in the process of contemplating its ruling. The letter from Brigadier General Azano approving in part and denying in part the application does not appear to be responsive and offers no explanation as to why the application was being denied in part, which is a requirement of the Act. The letter simply says "The rest of the application for permit is denied." The letter does not meet the requirements of the Act, including the requirement to "indicate the reason for the disapproval" in writing to the State licensing agency (34 C.F.R.

§ 395.16) and the requirement that “any limitation on the location or operation of a vending facility for blind vendors” must be “fully justified in writing to the Secretary” of Education (*id.* § 395.30(b)) and does little to resolve the issue to be decided by this Panel. The Panel Majority’s position that the sufficiency of the Respondent’s response was not before this Panel is perplexing. Petitioner was entitled to a response that conformed with the law and when confronted with an obvious violation of the regulations the Panel was obligated to cite the violation and require a remedy. However, it shirked its responsibility and refused to deal with the underlying issue that brought this case to fruition.

3. The Panel Minority further finds that Respondent violated 34 C.F.R. 395.30(s) in that it has not taken “all steps necessary to assure that, wherever feasible, in light of appropriate space and potential patronage, one or more vending facilities for operation by blind licensees shall be located on” Eglin Air Force Base. To the contrary, Respondent’s actions have demonstrated a total lack of regard for the law and the obligations it imposes on Respondent to establish vending facilities to be operated by the blind. The goal should be to identify enough vending that a blind person can earn a living and become self-supporting, which is the purpose of the Act. In considering potential sites, buildings with fewer than 100 Federal employees and/or less than 15,000 square feet should be considered, as the priority is applicable to these buildings. The parties should not limit their efforts to vending machines only. Snack bars, C-Stores, micromarkets, and food courts all fall within the definition of “vending facility” found at 34 C.F.R. § 395.1(x), and such locations should also be

considered. There are reportedly 8,000 people working at Eglin Air Force Base and the Panel Minority cannot imagine a scenario whereby a business that would support a blind entrepreneur could not easily be identified.

4. In regards to Petitioner's request that the Panel consider the issue of Respondent's failure to share vending machine income as required by 34 C.F.R. § 395.32, the Panel Minority concurs with the Majority in its finding that Petitioner did not identify this as an issue when requesting the Department of Education to convene an Ad Hoc Arbitration Panel. Therefore, it is beyond the scope of these proceedings and the Panel should make no ruling. However, the Panel Minority notes that the income sharing provisions found at 34 C.F.R. § 395.32 may apply to some of the current vending. In order to avoid a future lengthy and expensive arbitration, the parties are encouraged to work in good faith to determine if any of the vending machines reach the threshold that would trigger the income sharing provision.

DATED: February 2, 2017.

Terry C. Smith, Panel Member